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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 679.

AETNA INSURANCE COMPANY, a Corporation, et al.,
Petitioners,

vs.

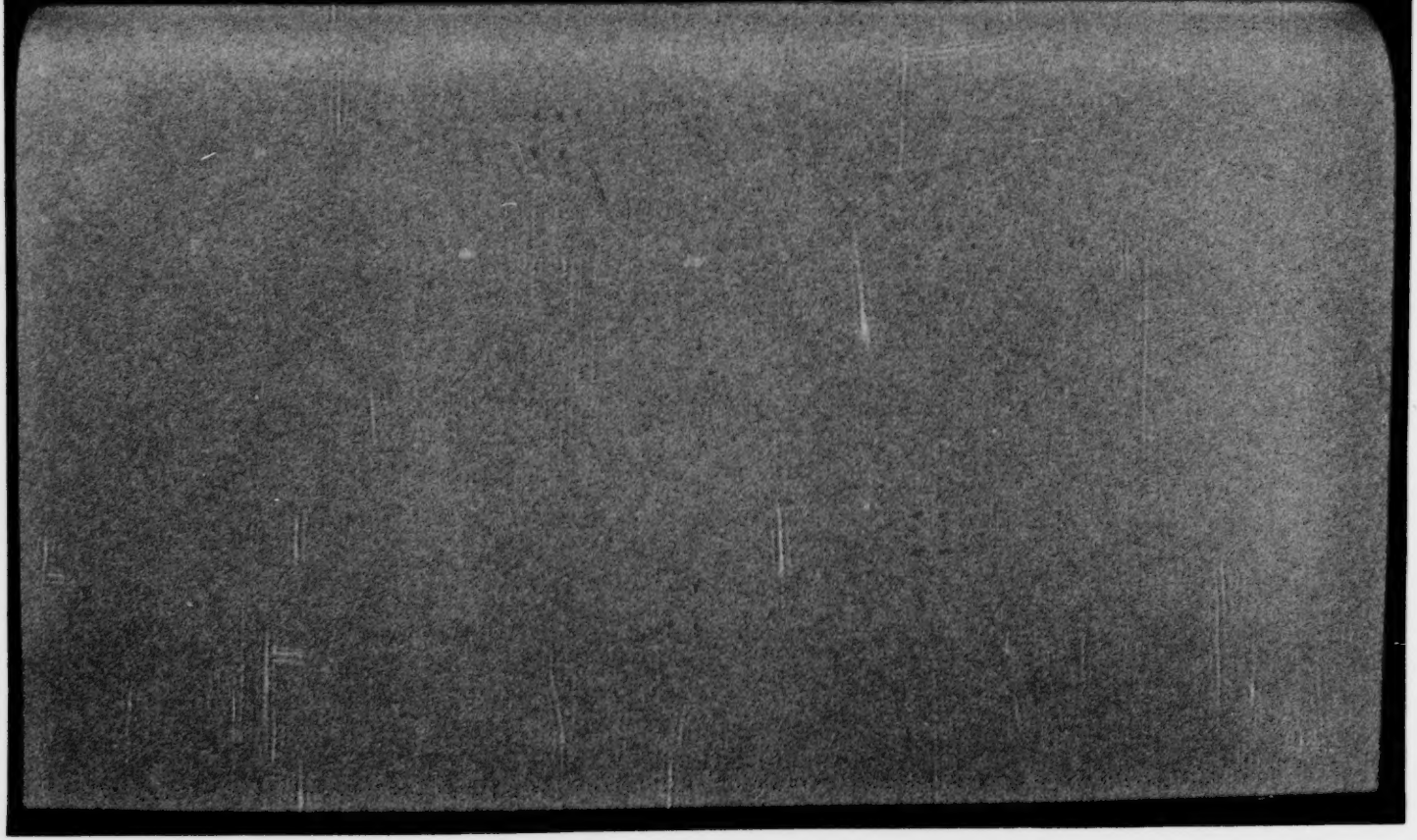
HART-BARTLETT-STURTEVANT GRAIN COMPANY,
a Corporation, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI (WITH APPENDIX).

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R. L. Polk & Co., Inc., 1956 Law Binder, Kansas City 6, Mo., Number 3-1956



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HART-BARTLETT-STURTEVANT GRAIN COMPANY,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

QUESTIONS PRESENTED.

The single "question presented" as set forth in the petition is deceptively misleading, in that it implies that Respondent was a party to the judgment relied on by Petitioners, which it was not. We therefore elect to restate the Questions Presented as follows:

1. Does this Court have jurisdiction to review a decision of a division of the Supreme Court of Missouri, to which no constitutional claim was presented, when a subsequent motion for rehearing or to transfer to the Court *en banc*, seeking to raise such a claim was denied without opinion?

2. Is a federal question presented as to the binding effect of a judgment on Respondent, which was not a party thereto, because of a contention that extrinsic facts and circumstances create a relationship of legal identification or privity with parties?

3. When all issues between Petitioners and Respondent were removed from the scope of a trial involving multiple parties and multiple issues, by leave of court upon a request of Petitioners, was Respondent bound by a judgment thereafter rendered in favor of Petitioners and against others?

4. Was there a sufficiently close legal relationship between Respondent and its lessors so that a judgment denying recovery to lessors under their insurance policies covering damage to the leased premises, in which policies Respondent had no interest, would bind Respondent on a claim for recovery under separate and distinct policies issued to it and covering its own separate interests?

All of these questions call for a negative answer.

STATE CONSTITUTION, STATUTES AND COURT RULES INVOLVED.

(Full Text in Appendix.)

Constitution of Missouri, Art. V, Sec. 9.
Missouri Revised Statutes, Sec. 509.010.
Missouri Supreme Court, Rules 1.08 (a), (c); 2.02.

STATEMENT OF THE CASE.

We believe that Petitioners' lengthy, argumentative, and repetitious statement of the case is unjustified, and that the material facts can be quite readily understood by reading that portion of the opinion of the Supreme Court of Missouri which discusses Petitioners' claim of estoppel by judgment (Pet. App., pp. xxix through xxxv). We cannot possibly set forth all points of disagreement within the compass of this brief, but because of the argumentative matter and some significant omissions, we shall supplement Petitioners' statement briefly:

(1) A glaring omission is the failure of Petitioners to advise this Court that, prior to judgment in the Kansas case, the explosion issue, as it affected Respondent, had been expressly withdrawn at the request of Petitioners themselves, and Respondent had therefore introduced no evidence on that issue.

At the commencement of the Kansas trial, the claims stated in the pleadings were as follows: (1) Respondent's claim for damages against its lessors on the covenants of the lease, which claim did not involve explosion or insurance in any way; (2) a third party complaint by the lessors against their insurers, including Petitioners, seeking a recovery over against the insurance companies for such part of Respondent's claim as might be adjudged against them which had resulted from explosion; and (3) a counterclaim and cross-claim for declaratory judgment by the insurance companies, seeking a declaration against the lessors and Respondent that no explosion had occurred. Respondent was not a party to the third party complaint, and had no rights under the insurance policies there sued on. Respondent had objected to the third party procedure, and had sought a

separate trial, but the objections raised prior to commencement of the trial had been denied by the court.

The order of proof at the trial is described in the opinion below (App. to Pet., p. xxxi). At the conclusion of the third-party defendants' case, and before Respondent had introduced any evidence of its own on the explosion issue, Respondent filed a motion seeking the withdrawal of that issue as applied to it (Estop. Exh., p. 1817). Several reasons were assigned, including lack of jurisdiction over the subject matter on the ground that it and the Kansas City Fire & Marine Insurance Company, which held the bulk of the insurance involved in the Kansas litigation but not in the Missouri litigation, were both Missouri corporations, and prejudice arising out of admissions against interest on the part of the lessors, one of which had an interlocking directorate and officers with such petitioner (Estop. Exh., Vol. 2, pp. 66-7), prejudicial to the explosion issue.

During argument on this motion the following took place (Estop. Exh., pp. 1828-9):

> "The Court: It is hard for me to see that there can be an issue to be resolved under general application for declaratory judgment as to the group of policies issued by the insurance companies to Minnesota Avenue, Inc., and the City, how the grain company can have any interest in those policies.
>
> "Mr. Clausen [then and now counsel for Petitioners]: I agree with you.
>
> "The Court: I think probably the motion upon the ground which the Court has suggested in its discussion, the motion should be sustained and there will be no issue submitted under the declaratory judgment cross-complaint as to the first count and as to the plaintiff in the action, but the trial has proceeded upon the liability of the insurance companies to Minnesota Avenue, Inc., and the City.

"Mr. Clausen: If Your Honor please, may I make a suggestion. Before you do that finally, it would look silly on our record and our pleadings to have that kind of a prayer which I didn't realize myself. Let me withdraw that from the pleading. I don't want to have that kind of a thing go up to a court of appeals because that was a mistake as far as I personally am concerned and I would prefer to withdraw it from the pleading so it would not necessitate having that kind of an order based on a pleading that apparently there was a mistake made in, and I would like to correct that and that would eliminate the necessity of any order on it."

Counsel for the insurance companies then requested and obtained leave to amend the "counterclaims and cross-claims" involved in the trial, so as to omit any reference to, or request for declaratory judgment against, Respondent (Estop. Exh., 1858). The amended prayer is quoted in the opinion below (Pet. App., p. xxxii). The judgment rendered in the Kansas case on the explosion issue was not entered against Respondent (Pet. 13), and Respondent was not a party to it in any way.

(2) All of the participation by Respondent in the trial of the explosion issue in Kansas referred to by Petitioners both in the statement and in the argument, occurred before the above-described amendment, as the Supreme Court of Missouri observed (Pet. App., xxxiv). The stipulation set out at length in the appendix had been agreed upon prior to the trial, for the convenience of all parties, and the facts stated therein would obviously be material to the defenses raised by lessors. The matters detailed on pages 16 through 20 of the statement all occurred prior to the filing of the third-party complaint, and long before the trial.[1]

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[1]If it has any significance, Petitioners' claim that the Missouri case was submitted on the same evidence as was the Kansas case

(3) The matters introduced by the caption on page 26 of the petition are purely argumentative, and are not supported by the record. Both the Supreme Court of Missouri and the United States District Court in Kansas found that Respondent neither had nor claimed any interest in its lessors' insurance policies, and was not the "real party in interest" on any claim for the proceeds, as the following extracts from the opinion demonstrate:

> "Plaintiff was not the insured in the policies issued to lessors indemnifying for damage to the elevator facilities due to explosion, and the issue of explosion was not essential to plaintiff's recovery on its claim against lessors." (Pet. App., p. xxx).
>
> "As we have noticed, the District Court in considering the sustension of plaintiff's motion for a directed verdict was of the view that plaintiff had no interest in the policies issued to lessors; and the judge also expressed the opinion that, apparently, there was no privity of contract claimed or asserted under which plaintiff would have had any rights under the policies of insurance issued to lessors. Clearly plaintiff would have had no property right in any proceeds of such policies." (Pet. App., p. xxxiv).

(Pet., p. 25) simply is not so. Respondent's witnesses in the Kansas case did not testify on the explosion issue, except possibly on cross-examination by the lessors and insurers. Numerous witnesses testified for Respondent in the Missouri case who had not testified in Kansas, to-wit: Saeger (Mo. S. Ct., Tr. 327), Roethe (419), Darbe (541, 567), Poisner (554), Studna (624), F. W. Bartlett (685), Kappeler (692), Benberg (695); and Bevan gave testimony (862) for Petitioners which was found by the Supreme Court of Missouri to aid Respondent. Also, in the Missouri case there were offers of proof for other witnesses, and numerous additional exhibits including motion pictures of experiments (635).

(4) We cannot determine what part of the statement is designed to comply with this court's Rule 23(f). In Point II of our argument we will show that no federal questions were timely raised in the Missouri courts.

Petitioners did not raise any question of full faith and credit in their answer, or in their brief or oral argument in the Supreme Court of Missouri. On February 2, 1954, Petitioners filed a second amended answer to plaintiff's petition in the trial court, and went to trial on this pleading (Tr. 47-57). Count III contained a claim that Respondent was estopped to relitigate the explosion issue, by reason of its participation in the trial of that issue in the Kansas litigation. Count IV asserted that Respondent was so estopped by reason of its legal relationship with its lessors. A copy of the Kansas judgment on the explosion issue was attached to the answer, and this showed on its face that Respondent was not a party to it (Pet., p. 13). No claim was made that this judgment was conclusive on Respondent by reason of the full faith and credit clause.[2]

---

[2]Petitioners are manifestly in error in assuming that a reply to this answer was required by Missouri law, or that there is any admission because no reply was filed. The Missouri law of pleading is substantially the same as the system prescribed by the federal rules, and no reply is required unless the answer contains a counterclaim, or unless the court expressly orders a reply. When no further pleading is required, all allegations of the opponent's pleading are taken as denied or avoided. This is shown by Missouri R. S., § 509.100 (Pet. App., p. x1) and 509.010 (our App.). In the case of *McIntosh* v. *Foulke*, 360 Mo. 481, 228 S. W. 2d 757, quoted from by Petitioners under their third point and described by them as "parallel in all respects to the pleading aspect present here," the answer prayed affirmative relief and the court had previously *ordered* a reply, which order was not complied with. There was no such order or claim in the present case. This case was cited on another point in Petitioners' brief in the Supreme Court of Missouri, but this is their first assertion that a reply was required.

Petitioners admit that they did not argue the full faith and credit clause before Division One of the Supreme Court of Missouri, and that this claim was first presented on transfer to the Court *en banc* (Pet. 9, 10, 32), which motion was denied without opinion (Pet. 3). The opinion below discusses all claims presented in the briefs, but contains no reference to the question of full faith and credit.

ARGUMENT.

POINT I.

Petitioners Show No Reason for the Exercise of This Court's Discretionary Jurisdiction.

Not one line in the petition shows existence of any of the standards for guidance set forth in Rule 19 of the Court as to certiorari proceedings, nor is any reason of equivalent importance suggested. Petitioners simply seek further review of a lawsuit presenting unique circumstances which probably never will recur. At the very most their claimed constitutional question is nothing "beyond the academic or the episodic," Cf. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70.

No ground for further review is stated simply because the Supreme Court of Missouri reached a conclusion on the merits different from the opinion of a Kansas federal judge, who was considering an evidentiary showing made by different parties. This Court does not review legal conclusions on matters of purely local law, and such differences of legal opinion are inherent in our federal system. *Riley* v. *New York Trust Company*, 315 U. S. 343, l. c. 349.

It is difficult to see what rule of general application Petitioners claim should be evolved in or applied to this case. What they apparently ask this Court to do is to review a massive record and hold that this record compels the conclusion that Respondent must be bound by a judgment to which it was not a party, on a theory that it was the "real party in interest" in its lessors' claims on their insurance policies. They must concede that to reach this result it would be necessary for this Court to arrive at a construction of the lease different from that reached both by the Kansas federal court and by the Supreme Court of Missouri, and that inferences must be drawn from the record which were not drawn by the lower courts. They admit that no precedent supports their claim (Pet. 51), nor is any constitutional authority cited which it is claimed the Supreme Court of Missouri overlooked or failed to follow. There simply is no question of general interest or importance so as to justify further appellate proceedings in this private suit over insurance contracts.

POINT II.

No Federal Question Was Properly Presented by Petitioners to the Missouri State Courts, and This Court Therefore Lacks Jurisdiction.

This Court has said many times that it will not review a claim of federal right which was not presented to the state courts. See, *e. g.*, *Walters* v. *St. Louis*, 347 U. S. 231. The burden is on Petitioners to show that federal questions were presented to and decided by the state court, *Lynch* v. *New York*, 293 U. S. 52. Here the opinion of the Supreme Court of Missouri is entirely silent as to the federal questions now claimed to exist.

In the case of *Manhattan Life Insurance Company* v. *Cohen*, 234 U. S. 123, l. c. 134, Mr. Chief Justice White said:

> "* * * Moreover, as a general rule, it is true that for the purposes of review by this court rights under the full faith and credit clause, § 1, Article IV of the Constitution, come within that class which are required to be expressly set up and claimed in the court below. *Johnson* v. *New York L. Ins. Co.*, 187 U. S. 491, 47 L. Ed. 273, 23 Sup. Ct. Rep. 194; *El Paso & S. W. R. Co.* v. *Eichel*, 226 U. S. 590, 597, 57 L. Ed. 369, 373, 33 Sup. Ct. Rep. 179; *Chicago, I. & L. R. Co.* v. *Hackett*, 228 U. S. 559, 565, 57 L. Ed. 966, 968, 33 Sup. Ct. Rep. 581. * * *."

Later holdings to the same effect are *Hartford Life Insurance Company* v. *Johnson*, 249 U. S. 490, and *Chandler* v. *Manifold*, 290 U. S. 665.

There was no claim of any federal right in the amended answer, on which Petitioners went to trial. The answer simply alleged that Respondent was estopped by a judgment to which it was not a party, without any mention of the full faith and credit clause. Such questions as these are not necessarily federal questions, as is shown by the following quotation from *El Paso and Southwestern Railroad Company* v. *Eichel and Weikel*, 226 U. S. 590, l. c. 597; describing a claim that a state statute was entitled to full faith and credit:

> "The points raised by plaintiff in error that are now relied upon as an assertion of Federal Rights were brought to the attention of the trial court and of the court of civil appeals like any other of the multitude of questions that were raised in those courts; and, so far as appears, the decision in both courts proceeded not in disregard of any Federal right asserted or suggested, nor even in disregard of the de-

cisions of this court or of the authority of those decisions, * * *."

Petitioners admit that they did not present any question of the full faith and credit clause to the Supreme Court of Missouri in their brief or oral argument to that court (Pet. pp. 9, 10, 32). Their statement of points required in that Court (Our App.) mentions no federal claim. They seek to excuse this failure simply on the ground that they were appellees at that stage, thus intimating that they were not required to present the point until after the opinion of the Supreme Court of Missouri, adverse to them, was handed down. The claimed excuse is not sufficient. Any argument that the Constitution required that the Kansas judgment be so applied as to conclude Respondent was as available to them then as it is now, and under the law of Missouri, as under any orderly system of appellate practice, the appellee has the duty of setting forth all grounds on which he relies in seeking affirmance, *Hughes* v. *St. Louis National League Baseball Club*, 359 Mo. 993, 224 S. W. 2d 989. An appellee will not be permitted to raise points in a motion for rehearing or for transfer to the court *en banc*, which were not presented at the initial hearing. *State ex rel. Cole* v. *Matthews*, (Mo. Sup.) 274 S. W. 2d 286; *State ex rel. Perrine* v. *Keirnan*, 361 Mo. 871, 237 S. W. 2d 156; *Leath* v. *Weaver*, (Mo. App.) 202 S. W. 2d 125.

In *Dorrance* v. *Pennsylvania*, 287 U. S. 660, this court denied certiorari for want of jurisdiction because the Petitioner, who had been *appellee* in the Supreme Court of Pennsylvania, had failed to present the federal questions relied on to that court, even though they had been presented to the trial court and petitioner had been successful there.

This court has consistently held that federal questions must be presented in the state courts in compliance with the state procedure. For many years Missouri has strictly enforced a requirement that constitutional questions be presented at the earliest opportunity. When such points are available at the time of answering, as they were here, their initial presentation in a motion for new trial or thereafter, as Petitioners tried (Pet. p. 8), comes too late, *Severson* v. *Dickerson*, (Mo. App.) 248 S. W. 595; *Marczuk* v. *St. Louis Public Service Company*, 355 Mo. 536, 196 S. W. 2d 1000. In numerous cases arising from Missouri, this court has approved the Missouri procedure and has declined further review for noncompliance. See, *e. g.*, *Hartford Life Insurance Company* v. *Johnson*, 249 U. S. 490; *Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256.

No federal question was discussed or passed on in the opinion of the Supreme Court of Missouri, although that opinion covered thoroughly everything presented in the briefs including numerous alternative claims made by Petitioners. In accordance with repeated decisions of this court (*e. g.*, *Ellis* v. *Dixon*, 349 U. S. 458), it must be assumed that the opinion did not discuss the federal questions because they had not been properly preserved and presented. Under Missouri law, this failure could have been both (a) because they were not contained in the answer filed in the trial court, and (b) because of Petitioners' failure to brief and argue them before the Supreme Court. Petitioners have failed to meet their burden of showing affirmatively that they seek review of a federal question presented to and decided by the Missouri courts.

Following the decision of Division One of the Supreme Court of Missouri. Petitioners attempted to raise federal questions in a motion for rehearing or in the alter-

native for transfer to the Supreme Court of Missouri *en banc* (Pet. p. 10). For purposes of review by this court, the highest court of the State of Missouri is the Supreme Court *en banc*, and the divisions of that court are considered subordinate courts of the state, *Gorman* v. *Washington University*, 316 U. S. 98. The denial of the motion for transfer to the court *en banc*, without opinion, must be assumed to be for the reason that the federal questions were not properly preserved or presented, *Durley* v. *Mayo*, 351 U. S. 277, and other cases collected in 100 L. Ed. 1200. That the Supreme Court of Missouri could have based its decision on this ground is indicated by the provision of the Constitution of Missouri (Art. V, Sec. 9, Our App.), requiring mandatory transfer of a case from a division to the court *en banc* when a federal question is involved.

This point is far more than procedural quibble. Petitioners have presented a lengthy document containing isolated passages from 3,000 pages of record, in two separate cases. They have made so many claims on matters of fact, construction, and interpretation that we cannot answer them within the scope of this brief, even though there are many points of disagreement. The state court has had no opportunity to sift the record so as to resolve disputes on matters which might be material to the claimed federal issues belatedly presented.[3] The result is that this court is now asked to consider an involved constitutional argument which is admittedly not supported by any authority whatsoever, and which the courts below had no opportunity to consider, on the basis of a voluminous rec-

[3]Even in the post-decision motion, the full faith and credit argument was only number Six of seven points raised, and occupied only two of the forty-eight pages of the supporting suggestions, without the citation of a single authority.

ord and disputed allegations not resolved in the state courts. The statutes defining the jurisdiction of this court were designed to avoid such complications at this stage of the proceedings.

POINT III.

No Federal Question Is Presented by a Claim That One Not a Party to a Judgment Is Bound Thereby Because of His Relationship to the Parties Thereto.

Since Respondent was not a party to the Kansas judgment, any claim that that judgment binds Respondent cannot be based on its terms, but must depend on extrinsic facts and circumstances. Petitioners recognize this by their assertions of privity, which is a term defining the class of cases in which one not a party to a judgment bears some of its burdens, or may claim some of its benefits. *Restatement of Judgments*, Sec. 69(2). A question whether extrinsic facts or circumstances are sufficient to create a relationship of privity, so as to bind one by a judgment to which he is not a party, *is not a question of federal law.*

This was expressly held in the case of *Bagley* v. *General Fire Extinguisher Company*, 212 U. S. 477. There the point at issue was whether one on whom a notice to defend had been served was bound by a judgment to which he was not a party. This court dismissed a writ of error (available at that time to a Circuit Court of Appeals only in cases involving constitutional questions) and, speaking through Mr. Justice Holmes, said (l. c. 480):

> "If the judgment binds the defendant, it is not by its own operation, even with the Constitution behind it, but by an estoppel arising out of the defendant's contract with the plaintiff and the notice to defend. * * * The decision, in other words, turned wholly on

the construction of the contract as excluding a liability over in the event that happened. *Even if wrong, it did not deny the Michigan judgments their full effect, but denied the preliminary relation between the defendant and the party to them without which the defendant remained a stranger to them, in spite of the notice to defend.*" (Emphasis supplied).

The same principle was announced in *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111. There this court held that the state courts of Massachusetts had the right to determine for themselves whether a plaintiff could maintain an action against an alleged tortfeasor, when the same claim had been unsuccessfully presented by the same plaintiff against an alleged co-tortfeasor in a New York federal court. The Massachusetts court had ruled that the estoppel of a judgment must be mutual, and this court held that nothing in the full faith and credit clause required it to reach a contrary result.

In *Postal Telegraph Cable Company* v. *City of Newport*, 247 U. S. 464, it is said at page 475:

> "*Res judicata*, like other kinds of estoppel, ordinarily is a matter of state law, * * *."

A question purely of the construction of a foreign judgment is not a question of federal law, *Chandler* v. *Manifold*, 290 U. S. 665.

The soundness of these holdings is apparent when we consider that the keystone of full faith and credit is that a judgment must have the same effect elsewhere that it has where it is rendered, and that there is no requirement that it be given more force abroad than it has at home, *New York ex rel. Halvey* v. *Halvey*, 330 U. S. 610; *South Ottawa* v. *Perkins*, 94 U. S. 260. The court which renders a judgment determines its effect only as between the parties to it.

To determine the existence of privity, on any asserted ground, there must necessarily be a consideration of evidence dehors the judgment.

It is significant that none of the cases cited by Petitioners to illustrate the doctrine of privity involved any contention of denial of full faith and credit. In all of the cases from this court cited on pages 54 through 58 of the petition, the lower court was affirmed in its finding that there was a relationship of privity.

Here, just as in the *Bagley* case, *supra*, the claim is that a contract should be construed so as to bind Respondent to a judgment to which it was not a party. The Supreme Court of Missouri rejected the contention on the basis of the evidence before it, and its construction of the lease. Nothing in the full faith and credit clause or decisions construing it furnished any guidance. The result does not run contrary to anything ordered by the Kansas judgment, and no effect was denied to that judgment which was intended by the court rendering it. The decision of the Supreme Court of Missouri, therefore, is based on adequate non-federal grounds.

POINT IV.

The Holding of the Supreme Court of Missouri That Respondent Was Not Estopped by the Judgment Against Its Lessors in the Kansas Litigation Is Clearly Correct.

The suggestion laboriously presented at pages 34 through 40 of the petition, that the Supreme Court of Missouri mistakenly applied the doctrine of *"res judicata"* rather than the subsidiary doctrine of collateral estoppel, is neither pertinent nor helpful. As a matter of legal terminology, collateral estoppel is considered a branch

of the general law of *res judicata*, as is shown by the quotation at pages 36 and 37 of the petition from the Partmar opinion and at page 39 from *United States* v. *Silliman*, 167 F. 2d 607, and also by the very language of the petition, e. g., the top of page 35 and first paragraph commencing on page 45. The case of *McIntosh* v. *Foulke*, 360 Mo. 481, 228 S. W. 757, shows that the Supreme Court of Missouri is quite aware of the distinction between relitigation of the same cause of action, and redetermination of a fact or issue previously determined between the same parties. Both *res judicata* in general, and collateral estoppel in particular, apply only to parties to the prior litigation. Actually, the bar of pure *res judicata* is stricter than is that of collateral estoppel, since it comprehends matters which might have been litigated in addition to matters actually litigated. The opinion shows that arguments presented by Petitioners on their claim of collateral estoppel were fully considered and decided in accordance with the weight of authority.

A. The Supreme Court of Missouri Correctly Found That Any Issues Between Petitioners and Respondent in the Kansas Litigation, As to the Explosion Issue or Otherwise, Were Expressly Withdrawn by the Court at the Request of the Petitioners.

There is no need to speculate as to the intent of the Kansas federal court on the explosion issue as that issue affected Respondent. Respondent moved the court to exclude the issue as to it, and the court indicated that it would sustain the motion. To avoid this ruling, Petitioners voluntarily amended their pleading, with the assent of the court. A separate final judgment was rendered on the explosion issue, and Respondent was not a party to that judgment.

Relying on this uncontrovertable showing from the record, the Supreme Court of Missouri correctly held that the judgment in the Kansas litigation did not determine the explosion issue as far as Respondent was concerned. This is a correct application of the law, based on the following general principles:

(1) A plaintiff and a third-party defendant are not adversary parties unless an issue is framed by the pleadings on which they are on opposite sides, 2 Moore, Federal Practice, 2d Ed., Section 13.06, page 16, Section 14.17, page 443.

(2) A judgment is not determinative of an issue except as that issue arises between adversary parties, *Graham* v. *La Crosse & M. Railway Company*, 3 Wall. 704; *Cushing* v. *Laird*, 107 U. S. 69; *Radford* v. *Myers*, 231 U. S. 725, refuting Petitioners' contentions that any party to a consolidated trial is bound by everything there determined, even matters immaterial to his interest.

(3) A judgment is not determinative of an issue which was originally present in the litigation, if that issue is abandoned by the parties or withheld by the court from the scope of the judgment (authorities cited by the court below, Pet. App., p. xxxiii.)

Since the explosion issue was so withheld by the court, Petitioners' assertions about participation by Respondent in the trial of the explosion issue in Kansas do not aid them. This participation, without exception, all took place before the explosion issue was withdrawn as to Respondent, and the claims by Petitioners' counsel that the explosion judgment would bind Respondent as set out at pages 63-5 of the petition, were all made prior to that time. Respondent had been an involuntary participant on the explosion issue, following the rejection of its

objections to the third-party proceedings and of its request for separate trials. Petitioners filed a cross-claim which until amended, sought a declaration of "no explosion" against Respondent. During the trial Respondent requested the court to reconsider its denial of separate trials, as was proper (*Partmar Corp.* v. *Paramount Theaters Corp.*, 347 U. S. 89), and the trial judge changed his mind, as he well might after hearing part of the evidence. The amendment made a formal ruling unnecessary. Thereafter, not being a party to the explosion issue, Respondent had no opportunity to and could not introduce evidence of explosion, or argue the point to the jury or the court. It had no trial on this issue since it was no longer involved.

Petitioners' citation of the *Partmar* case, *supra*, as authority that Respondent could have appealed from the Kansas judgment on the explosion issue, is unsound. In that case a judgment on part of the issues was rendered in favor of Partmar, but a finding essential to this judgment was that Paramount had not violated the antitrust laws. Partmar had tendered both a defense and a counterclaim, on inconsistent theories, and was seeking holdings that the antitrust laws were not violated, so that it could retain its valuable lease, but that they were violated, so as to support a treble damage action. This court was careful to point out that Partmar had had full opportunity to be heard, and had been heard, in opposition to the challenged finding of fact, which was rendered as a necessary part of a judgment to which it was a party. In the present case the federal court did not adjudicate anything affecting Respondent on the explosion issue, or any issue at all between Petitioners and Respondent.

This court has consistently held that only a party to a judgment or decree may appeal therefrom, *Grant* v. *United*

States, 227 U. S. 74; *In re Leaf Tobacco Board of Trade*, 222 U. S. 578. A corollary is that a party to a suit, who is not a party to a final and separate decree rendered therein, has no right of appeal from such a decree. *Hanrick* v. *Patrick*, 119 U. S. 156; *Farmers Loan and Trust Company* v. *Waterman*, 106 U. S. 265. The same holding has been announced by practically every appellate court in the country and cases are collected in 4 C. J. S., Appeal and Error, Section 183(a), Section 183(b)1 and 5 C. J. S., Appeal and Error, Section 1497(b). Nothing in the *Partmar* opinion changes these principles, and the decision there is limited to rights of *parties* to a decree to appeal from findings which are necessary to that decree.

Utterly without merit is the intimation that Respondent could have appealed "in the name of its lessors." Respondent had no control over its lessors and could not have appropriated their names to appeal from the judgment on a claim which belonged only to them. Nor can an appellant allege error affecting only a non-appealing party, *Cherokee County* v. *Wilson*, 109 U. S. 621; *Chittenden* v. *Brewster*, 2 Wall. 191.

Petitioners are the parties who should be estopped on the basis of the Kansas proceeding. The conduct of their chief counsel could only have the effect of leading Respondent to believe that it was no longer affected by the explosion trial in Kansas. The result was that Respondent was induced to cease all further efforts at influencing the determination of that issue, and undoubtedly the court would not have permitted such further participation. One cannot be heard to claim that an issue was determined by a judgment when itself responsible for removing that issue from the scope of the trial.[4] "Full faith and credit"

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[4]*Cox* v. *Imes*, (Mo. App.) 219 S. W. 399, holding that a party moving for dismissal of a counterclaim cannot later contend that

should require faith and credit to the action of the judge in Kansas in unequivocally withdrawing explosion from the scope of the Kansas trial insofar as Respondent was concerned.

Petitioners' own citations show that the doctrine of collateral estoppel applies only to an issue actually litigated and determined—not to a matter which might have been litigated but was not. The Supreme Court of Missouri properly concluded that Respondent had not had a trial of the explosion issue in Kansas, and that no rule of *res judicata* or collateral estoppel is ever applied to prevent a party from having one fair trial of his case. In so holding, the Missouri court did not deny effect to anything adjudicated or intended to be adjudicated by the Kansas court—it simply refused to give the Kansas judgment an effect which the judge rendering it did not intend. This is entire compliance with the law of full faith and credit.

B. The Supreme Court of Missouri Correctly Concluded That There Was No Legal Relationship Between Respondent and Its Lessors Such As to Bind the Former by a Judgment Solely Against the Latter.

Apparently recognizing that Respondent cannot be bound by a judgment to which it was not a party, Petitioners fall back on a claim of privity. As is shown by the quotation on page 52 of the petition, the minimum requirement for the application of the concept of privity is that a

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it was adjudicated; *Frick Co.* v. *Rubel Corp.*, (D. C. E. D. N. Y.) 1 F. Supp. 100, holding that one consenting to dismissal of claim without prejudice cannot thereafter assert that the claim was determined with prejudice; also many decisions of this court holding that a party cannot subsequently take a contrary position about matters decided at his request or with his acquiescence. See, *e. g.*, *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U. S. 228; *New York Elevated R. Co.* v. *Fifth National Bank*, 135 U. S. 432.

person must be so identified in legal interest with another that he can be said to represent the same legal right.

The suggestion that Respondent is in privity with its lessors, who denied all liability to Respondent and bitterly contested every item of damage claimed by Respondent, is so unreasonable, that to state the proposition is to refute it. A correlative rule which must always be observed in determining the scope of privity is that there is a denial of due process of law in binding one by a judgment to which he is neither party nor privy. *Riley* v. *New York Trust Company*, 315 U. S. 343, l. c. 354; *Postal Telegraph Cable Company* v. *Newport*, 247 U. S. 464; *Hansberry* v. *Lee*, 311 U. S. 32.

One ground of privity alleged is the assertion that the grain company "injected" the explosion issue into the Kansas litigation. This is completely refuted by the opinion below and by the record, which shows prompt objection by Respondent to the institution of the third-party proceedings which brought the explosion issue into the case. Respondent consistently contended that explosion was no part of its burden of proof in its claim against lessors, and the Kansas court so held. The jury returned a verdict in favor of Respondent there, although unable to agree on the question of explosion. References in the petition to pleadings which were amended prior to trial, and to colloquy and briefs filed in pre-trial proceedings, are out of context and wholly immaterial.

Petitioners also state as a fact that Respondent was a "real party in interest" in regard to the insurance policies issued to its lessors, and assert this as a ground of privity. Both the Supreme Court of Missouri and the Kansas federal court found that this was not so, and that Respondent had no interest in its lessors' policies. Respondent was

entitled to its judgment against lessors for all flood damage, and whether the lessors could recoup any of this from their insurance carriers concerned them alone.[5]

Petitioners also seek to make privity by saying that Respondent furnished employees as witnesses for the lessors on the explosion issue. Only one employee testified for lessors and he was subpoenaed (Estop. Exh., p. 941).

The Restatement of Judgments, Sections 78 through 111, classifies situations in which one may be bound by a judgment against another. None of these situations is even close to the present case.

Nor do Petitioners' case citations aid them in maintaining their present claims. *Lovejoy* v. *Murray*, 3 Wall. 1; and *Pelton* v. *Trico Oil Company*, (Tex. Civ. App.) 167 S. W. 2d 625, hold that one actually in control of litigation and having an interest therein may be treated as a party. In this case Respondent's lessors disputed every item of Respondent's cause of action. *Souffront* v. *La Compagnie*, 217 U. S. 475, and *Leahy* v. *Mercantile Trust Company*, 296 Mo. 561, 247 S. W. 396, hold that one who expressly authorizes another to present his claim is bound by the re-

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[5]Even if Respondent stood to benefit by a judgment in favor of the lessors on their policies, it does not follow that it would be estopped by a determination on a particular fact in the lessors' action. A judgment against a promisee in a contract does not bind a third-party beneficiary, Restatement of Judgments, § 105(b). A judgment against a representative or fiduciary is binding on the beneficiary only as to the subject matter of the representation, and does not estop the beneficiary as to a claim which the beneficiary holds in his own right. *Ibid*, Sec. 85, and particularly Illustration 6. A judgment against one cotenant does not bind other cotenants who are not parties, even though they might stand to benefit if the adjudication had been favorable, Annotation, 169 A L. R. 179.

sult, but here Respondent *objected* expressly to the third party proceedings instituted by its lessors, as is admitted by the petition (p. 11). The case of *Stout* v. *Lye*, 103 U. S. 66, simply holds that one acquiring an interest in the subject matter of litigation in progress is bound by the judgment, which is a familiar rule but utterly foreign to this case.

On pages 52 and 53, Petitioners set forth the law of class or representative suits, and cite *Sovereign Camp* v. *Bolin*, 305 U. S. 66. In such a suit a court expressly decides that persons who are not before it are bound, because their interests are adequately represented. No valid claim of representation could be made in this case, for Respondent and its lessors were adversary parties. The Kansas court was not asked to decide this case as a representative suit and did not do so. Quite the contrary—Respondent objected to being allied with its lessors, and the court dissolved the alliance. An attempt to make a case into a representative suit after judgment, when it was not prosecuted as such, finds no favor in the decisions of this court. See *Hansberry* v. *Lee*, 311 U. S. 32.

The doctrine of privity, moreover, should have no application to a situation in which the alleged privy was a party to the suit in which the judgment sought to be used against him was rendered, on issues not determined by the judgment. The effect of a judgment on parties to a suit is spelled out by its terms. Those who want a court to take particular action should file pleadings requesting that action, and a litigant is justified in assuming that issues previously excluded by an amendment, and not contained in the judgment, simply are not adjudicated. Petitioners are really seeking to amplify the Kansas judgment, on the basis of extrinsic evidence, but are unable to cite any authority allowing this to be done.

Whether the question be viewed as one of federal law or state law, the holding of the Supreme Court of Missouri that no rule of *res judicata* or collateral estoppel can be applied so as to deprive a litigant of one full and complete trial, and that there was no privity here, is entirely sound and in accordance with all authorities. Any contrary conclusion would be utterly inconsistent with general principles of justice, and undoubtedly a denial of due process.

POINT V.

The United States District Court in Kansas Had No Jurisdiction over Any Ordinary Civil Controversy Between Respondent and Petitioners, and Therefore Respondent Could Not Be Estopped by Any Determination in the Kansas Case.

The record shows that Respondent is a Missouri corporation and that one of the Petitioners, Kansas City Fire & Marine Insurance Company, is also a Missouri corporation (Tr. 1). There is no diversity of citizenship between Respondent, on the one hand, and Petitioners, on the other, and ordinary civil matters arising between them could not be litigated in the federal courts. This was expressly held by Judge Duncan in his opinion in *Hart-Bartlett-Sturtevant Grain Company* v. *Aetna Insurance Company et al.*, 108 F. Supp. 757, remanding this case to the state court after Petitioners had attempted to remove it. This point was never finally decided in the Kansas litigation, since all issues there between Petitioners and Respondent were eliminated prior to the rendition of judgment, but it is apparent that the trial judge there would agree that he had no such jurisdiction on the basis of his opinion in *Aetna Insurance Co. et al.* v. *Chicago, Rock Island and Pacific R. Co.*, 127 F. Supp. 895, affirmed (10 Cir.) 229 F. 2d 584

In Restatement of the Law of Judgments, Section 71, it is expressly declared that a judgment cannot operate by way of estoppel as to an issue which the court rendering the judgment would lack jurisdiction to determine directly.

In the present case, no United States District Court could have jurisdiction of the claim stated by Respondent's petition in the Missouri case. No federal proceedings, therefore, could operate as an estoppel against plaintiff on any issue material to that claim.

Certainly a claim for damage to grain and interruption of a grain business under an insurance policy is not in any sense ancillary to a suit involving damage to a building under a lease, so as to extend the scope of federal jurisdiction under the doctrine of *Hurn* v. *Oursler*, 289 U. S. 238.

This principle demonstrates an additional reason why the result reached by the Supreme Court of Missouri is correct.

CONCLUSION.

Certiorari should be denied.

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APPENDIX.

State Constitution, Statutes and Court Rules Involved.

(All Emphasis Added, except phrase *en Banc.*)

Constitution of Missouri, Art. V, Sec. 9:

> Section 9. Transfer of causes to supreme court *en banc.*—A cause in the supreme court shall be transferred to the court *en banc* when the members of a division are equally divided in opinion, or when the division shall so order, *or on application of the losing party when* a member of the division dissents from the opinion therein, or *a federal question is involved,* or pursuant to supreme court rule.

Missouri Revised Statutes, Sec. 509.010:

> 509.010. Shall be petition and answer—reply if answer contains counterclaim.—*There shall be a petition and an answer;* and there shall be a reply if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party petition if leave is given to summon a person who was not an original party; and there shall be a third-party answer, if a third-party petition is served. *No other pleading shall be required except that the court may order a reply to an answer or a third-party answer.*

Missouri Supreme Court, Rule 1.08 (a):

> 1.08—Briefs: Contents. (a) All briefs shall be printed. The brief for appellant shall contain: (1) A concise statement of the grounds on which the jurisdiction of the review court is invoked; (2) a fair and concise statement of the facts without argument; (3) *The points relied on, which shall specify the allegations of error, with citation of authorities thereunder;* provided, however, if more than three authorities are

cited in support of a point made, the three authorities principally relied on shall be cited first; and (4) An argument.

* * *

(c) The statement of the facts and the argument shall have specific page references to the transcript on appeal, or, if the transcript is printed, to the printed transcript. The respondent in his brief may adopt the statement of facts of the appellant, or, if not satisfied therewith, he shall in a concise statement correct any errors therein. *In other respects the brief of the respondent (to the extent necessary) shall follow the order of that required of the appellant.*

2.02—Transfer to the Court *en Banc*. A motion to transfer a cause under the provisions of the Constitution from either Division to the Court *en Banc* must be filed within fifteen days after the opinion of the court shall be delivered in Division and notice of the filing thereof must be served on the adverse party, or his attorney. A motion to transfer to the Court *en Banc* may be joined with a motion for rehearing and a rehearing or transfer may be prayed for in the alternative.

Extract from Statement of Points and Authorities in Brief of Respondents (Petitioners Here) in the Supreme Court of Missouri.

(This statement is required under Rule 1.08 of the Supreme Court of Missouri. The specific authorities are omitted, except under Point D, which relates to the estoppel issue.)

A.

The Trial Judge Acted Correctly in Setting Aside the Verdict, and in Sustaining Respondents' Motion for Judgment in Accordance with Their Motion for Directed Verdict, Since, in Light of the Uncontradicted Evidence, There Was No Issue of Fact Properly Submissible to the Jury.

1.

Appellant's Case Depended upon Circumstantial Evidence. Proof by Circumstantial Evidence Must Be Such That the Necessary Facts to Support a Verdict May Be Inferred and Must Reasonably Follow. The Evidence Must Be Such As to Exclude Guesswork or Speculation and Must Have a Tendency to Exclude Every Other Reasonable Conclusion. It Is Not Enough That the Evidence May Be Merely Consistent with the Desired Conclusion.

In General:

(Six authorities cited.)

Cases Involving Alleged Explosions:

(Three authorities cited.)

2.

If the Loss May Have Resulted from One of Two Causes, for One of Which and Not the Other the Defendant Is Liable, the Plaintiff Has Failed in Its Action Unless It Shows with Reasonable Certainty That the Cause for Which the Defendant Is Liable Produced the Result.

(Two authorities cited.)

3.

Even Though a Plaintiff's Proof Is Taken Most Favorably to It, the Law Will Not Tolerate Forced or Speculative Inferences.

(Two authorities cited.)

4.

Upon the Only Direct Evidence As to the Movement of the Metal Hopper Bottoms, It Was Established, Without Contradiction That Such Hopper Bottoms Were Disengaged Slowly and Gradually Because of the Swelling of the Wet Grain. The Gradual and Piecemeal Release of Such Pressure, Followed Ultimately by the Hopper Bottoms Dropping to the Floor Below, Was a Continuous Occurrence Which Must Be Viewed As an Entirety. Measured As an Entirety, Such Occurrence Did Not Possess Either Suddenness or Instantaneous Reaction. Such Occurrence Was Not an Explosion.

(Four authorities cited.)

5.

Undisputed Documentary Evidence Also Sustained Respondents' Theory.

See argument.

6.

The Trial Court Properly Set Aside the Verdict, Because Plaintiff's Evidence As to Damages Failed to Separate, with Certainty Those Damages Admittedly Attributable to the Flood Alone, from the Damages Which Plaintiff Claims Were the Result of the Alleged Explosions.

(Four authorities cited.)

7.

It Is a Judicial Function to Determine Whether the Evidence Is Substantial, and If It Is Not, There Is Nothing for the Jury to Decide.

(One authority cited.)

8.

The "Scintilla" Rule Does Not Apply in Missouri.

(One authority cited.)

B.

Appellant Does Not Assign Any Error on This Appeal with Respect to the Exclusion of Any Evidence Offered by It at the Trial. Appellant Is Not Entitled to the Benefit of Any Such Excluded Evidence in Connection with the Issues Raised upon This Appeal.

Supreme Court of Missouri Rule 3.23.
(One authority cited.)

1.

There Is a Presumption That the Trial Court's Rulings on Evidence Were Correct.
(One authority cited.)

2.

The Evidence As to What Happened in Other Elevators, Particularly in Situations Wholly Lacking in Similitude, Was Properly Rejected by the Trial Court.
(One authority cited.)

3.

Even If the Trial Court Erroneously Refused Certain Evidence Proffered by Plaintiff, Such Ruling Does Not Remedy Plaintiff's Lack of Affirmative Proof.
(One authority cited.)

C.

If the Court Should Reverse the Judgment, the Verdict Should Not Be Reinstated, Because the Trial Court Erred in Not Sustaining, in the Alternative, Defendants' Motion for New Trial. Defendants' Alternate Motion for New Trial Was Predicated upon the Following Valid Grounds: (a) Plaintiff's Evidence As to Damages Failed to Separate, with Certainty, Those Damages Admittedly Attributable to the Flood Alone, from the Damages Which Plaintiff Claims Were the Result of the Alleged Explosions; (b) There Was No Evidence As to

Damages, Sufficient to Support the Verdict on Either Count of the Petition; (c) The Trial Court Erred in Giving Plaintiff's Instructions Numbers 2 and 3, Relating to Damages, Since There Was No Evidence to Support Either of Said Instructions; (d) The Trial Court Erred in Failing to Admit into Evidence Defendants' "Estoppel Exhibit"; (e) the Trial Court Erred in Failing to Recognize That the Verdict on Counts I and II of the Petition Was Excessive and Improper, Because It Was Not Supported by the Evidence.

(One authority cited.)

D.

The Trial Judge Properly Held That the Appellant Was Precluded from Relitigating the Explosion Issue.

McIntosh v. *Foulke*, 360 Mo. 481, 228 S. W. 2d 757.

Taylor v. *Sartorious*, 130 Mo. App. 23, 108 S. W. 1089, 1094.

Restatement of Judgments, Sec. 83.

Bruzewski v. *United States*, 181 F. 2d 419, 422, 423.

Young v. *Byrd*, 124 Mo. 590, 28 S. W. 83, 84.

Healy v. *Moore*, (Mo. App.) 100 S. W. 2d 601, 605, 606.

Hall v. *Wilder Mfg. Co.*, 316 Mo. 812, 293 S. W. 760, 766.